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Supreme Court, U.S.
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IN THE

Supreme Court of The United States

CHARLES W. BIRKS,
Petitioner, *pro se,*

v.

KEITH F. PARK, Esquire ; COUGHLIN STOIA GELLER RUDMAN & ROBBINS, LLP ; REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Respondents.

On Petition for Extraordinary Writ of Prohibition/Mandamus and Request for Final Judgment to The U.S. Courts of Appeals for The Fourth and Fifth Circuits

In re Charles W. Birks

Prepared by litigant, *pro se* :
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Cites to Constitutional Provisions , Statutes , Rules , and Regulations in the Case

Cited here and NOT found in Appendix

A. Federal Rules of Civil Procedure Rule 9(b)

(b) Fraud or Mistake; Condition of Mind. In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally. Cited page 36

B. Federal Rules of Civil Procedure Rule 23(a)(4)

(4) the representative parties will fairly and adequately protect the interests of the class.

Cited page 16

Cites found in the Appendix
(Per Supreme Court Rule 14.1(f),
see Appendix at A-6)

1. U.S. Constitution First Amendment :

Cited at pages 22, 23, 24

2. U.S. Constitution Eleventh Amendment :

Cited at pages 21, 22

3. 28 U.S.C. 1294(1) : Cited pages 3 and 9

4. 28 U.S.C. 1651 : Cited page 3

5. 28 U.S. C. 2101(e) : Cited page 5

6. PSLRA §78u-4(a)(2)(A) : Cited page 12 , 14, 15

7. Particularly - §78u-4(a)(2)(A)(iii) :
Cited Pages vi, viii, 14, 34

8. PSLRA §78u-4(a)(4) : Cited Pages vi, viii, 12, 14, 35, 36

9. Federal Rules of Civil Procedure Rule 11(b)(2)
Cited page 6, 10

10. Federal Rules of Civil Procedure Rule 11(b)(3)
Cited page vii, 16, 37,38

11. Federal Rules of Civil Procedure Rule 11(c)(3)
Cited page 37

12. Federal Rules of Civil Procedure Rule 11(c)(4)
Cited pages vi, vii, 16, 37,38

13. Description of Due Process Criteria found in Proposed Findings and Recommendations, Docket Entry No. 16 at page 4 or at page 7 of the Appendix Cited page 24

Statement of the Case

Introduction

Generally, the Plaintiff's case deals with unlawful behavior by representatives within a 2005 securities class-action as was settled in The U.S. District Court, Southern District of Texas, Houston Division (Texas Court). The Defendants here are those Class-Representatives as were appointed to serve the class interests. This Plaintiff was a member of that plaintiff-class. Plaintiff's case is not seen to effect Settlement Finality in any way and the authority of courts to make settlements is not challenged.

The effect of such a case is to hold class-representatives responsible for actual-results when manipulation of information and circumstances indicate, as here, that class-interests have not been the focus of that representation. It would be wholly unreasonable for law interpretations to allow any representatives to be unaccountable to those they represent. Further, the Private Securities Litigation Reform Act (PSLRA) law, as cited, isn't seen as about accountability for "poor" representation by incompetence ; instead, it is about malicious representation where representative-self-interest so overwhelms class-interests.

The basis for jurisdiction in The U.S. Court of

Appeals for The Fourth Circuit (4th Circuit Court) was 28 U.S.C. 1294(1) an appeal from an Order of a U.S. District Court within The 4th Circuit. The basis for jurisdiction in the U.S. District Court should have been Federal Rules of Civil Procedure (F.R.C.P.) Rule 11(b)(2).

Specifically, Plaintiff's Petition for Extraordinary Writ and request for Final Judgment desires this court's address to and interpretation of the PSLRA provisions cited and certain procedural anomalies within Federal Courts ; as well as, a rendering of Constitutionality of Civil Mail Fraud treatments and practices within The Fourth Circuit, particularly the U.S. District Court, Southern District of West Virginia, Charleston Division (West Virginia Court).

The Mail Fraud Issue was presented to The West Virginia Court as an ancillary issue to establish personal jurisdiction and venue ; and , so, failing in that purpose, by decision of The West Virginia Court, that issue is also an additional Collateral Order issue to the Collateral Order issue described immediately below.

The present basis in this court is within the nature of The 4th Circuit Court treatment of Collateral Order Doctrine applied to the Order of The West Virginia Court as transferred the case to The Texas Court. The transfer was primarily due to a misreading of a provision within the Final Order and Judgement of that same Texas Court in the

Dynegy Securities Litigation Class-Action 2005 Settlement. The Collateral Order matters described to The 4th Circuit Court and dismissed or denied, are more than an erroneous factual finding because the failure of Collateral Order Doctrine resulted in a levy of excessive process first in Texas and now in Louisiana.

That provision, forwarded by Defendants and objected, has been identified throughout submissions as the Continuing Jurisdiction Provision (CJP) as requires this court's interpretation and determination that , in fact, the misinterpretation, itself, is a decision of an ancillary issue which, by causing transfer of the case, created adverse effect to the Plaintiff's case and was an Immediately-Appealable Collateral Order Issue addressable in The 4th Circuit Court.

The Continuing Jurisdiction Provision (CJP) is written with an ambiguous construction. The interpretation and, so, proper application, is in itself complicated by circumstances of : 1.The Texas Court failure to effectively publish the terms and conditions of the Settlement Stipulation; 2. that effective concealment of additional Settlement Terms and Material Facts within the unavailable Stipulation; 3. the questionable, general validity of unpublished settlement stipulations by their effect on Informed Consent; and , 4. the Defendants' failure to make objection or complete a full-disclosure of Material Facts , themselves, as was their duty to those they represented.

Plaintiff's grammatical-proof of the meaning as actually written in the CJP is found for review in either Docket Entry No. 22 at page 2 or Docket Entry No. 41 at pages 8 - 9. The CJP clearly requires a specified breach of settlement terms to be activated.

That provision has been purported to grant essentially perpetual active-jurisdiction over all matters and derivatives of the Dynegy Settlement to that Texas Court. Plaintiff has objected constantly to the redefining of his case as other than a law violation case against representative behavior as was committed during that settlement and not an action against that finalized settlement, itself.

Notwithstanding the fact that no specified breach was introduced, the provision was used to distract attention from numerous untoward behaviors constituting intentional deception and completing the violation of representative duty under (PSLRA) law provisions as cited within §78u-4(a)(2)(A) and §78u-4(a)(4).

That U.S. Courts have persistently read the CJP incorrectly, remains of mysterious motivation. The similarity of elements required to describe the PSLRA violations case and those elements in common with a different-focused case of Collateral Attack on the Settlement , as Defendants insist characterizes Plaintiff's case, does not explain court deference to the misread CJP except as a

resistance to the PSLRA laws. The Texas Court refused to acknowledge even the presence of Plaintiff's PSLRA law cite (in Docket Entry No. 41 p. 6) in its Memorandum Opinion and Order of February 12, 2009 , Docket Entry No. 45. Plaintiff concludes that the pre-result judgments of the Texas U.S. District Court in that Dynegy Settlement are being defended vigorously from the purported neutral-center by these courts, themselves, in conflict with the clear intention of reform-law and Congressional and Executive Authority as exists to create and endorse the laws, as needed.

In Plaintiff's perception, that conflicting motivation of courts results from a misunderstanding as is then applied to hold-fast in preservation of that permanence of prior-judgments and Settlement Finality when only the smallest portion addressing actual-results as the representatives' responsibility has changed via the reform law. To truly serve law and justice, as seen in not only this Plaintiff's opinion but those opinions of Congress and The Executive as found in their actions to commit reform-law, a necessity exists to contest court pronouncement of pre-result, pre-conclusions of either the fairness of actual-results when differing from expectations or the honorable intentions of representatives in their flawed actions and submissions, as are addressed in this case.

Much of what is alleged has been essentially

admitted by Defendants ; the operational characteristics of court treatment of the violations is now the essence of the case. That observation is not new. Plaintiff observed and described the problem in Plaintiff's July 2008 Objection to Proposed Recommendations and Findings , Docket Entry No. 17 at pages 2 - 4.

The Statement in Support of The Questions

Supporting argument for Question 1 :

As Statute Law is enforceable in the courts and would be a failure of Equal Justice and Due Process to ignore, that law is not subject to the same Judicial Discretion as are Rules of Procedure. The meaning of §78u-4(a)(2)(A)(iii), "willing to serve on behalf of a class" is clear, as is §78u-4(a)(2)(A)(vi) and §78u-4(a)(4) when describing equal-portion share in any award .

The two Board of Director's Seats concession by the settling company is not valueless. Settling companies do not first negotiate equitable restitution to the class and then out of innate generosity offer control within their Boards of Director's. Monetary restitution to the plaintiff-class was bargained-away in negotiation for that control, no matter it is described innocuously as "Governance Provisions". Whatever value can be attached to that control is minimally a subtraction-modification to the restitution the remaining class

receives and because of the merged-interest of Lead-Plaintiff Regents within the Corporate Offices of the settling company, no one could know exactly the full-extent of the bargain. Plaintiff in Docket Entry No. 9 Explanation of Exhibits on page 3 calculated the value of that control at 339 million Dollars in the Dynegy Settlement.

The PSLRA law cites describe a constraint placed on the presiding court as beyond its Judicial Discretion, to itself, alter one-way-or-another the portions as are due the plaintiff-class except for reasonable costs and expenses allocated to any representative party. The cite at 403 U.S. 744 (entry 3, Table of Authorities) describes the court as not responsible to discourage the Defendants' law violations in negotiation for and acceptance of dis-proportionate awards.

The would-be Lead-Plaintiff hoping to represent a class must sign specific PSLRA Sworn Certificate, described in §78u-4(a)(2)(A), to act only on behalf of the class as a condition of court appointment to the position. Lead-Counsel's behavior is directly supervised by Lead-Plaintiff ; and, so, the law binds them both to honor that pledge. The "reform" in PSLRA was, in pertinent part, needed as a method of interdiction of outrageous past-conduct within class-actions.

The Sworn Certificate provision is intended to place everyone on notice to the presence of the reformed law and serves as a public assurance that

the law would be obeyed. To act to disobey the PSLRA is then demonstrable as intentional violation. Such law must necessarily be an independent civil-cause-of-action within the courts or there is no means of enforcing the reform. Congress' intention to place limitation on pre-result pronouncements made by permanent Judicial Decrees of F.R.C.P. Rule 23 (specifically R. 23(a)(4)) and Rule 11 (specifically R. 11(b)(3)) satisfaction are challenged and in this Plaintiff's opinion overturned by the law.

The *Sworn Certificate provision is precisely a* "public assurance" because a presiding judge could sanction observed violation of F.R.C.P. Rules 11 or 23 at any time regardless of the presence of that Certificate. The mechanism of F.R.C.P. Rule 11(c)(4) sanction for providing information later proved false, itself, contravenes permanence of pronouncements and regards the actual result.

To date no U.S. Court involved in determinations to this case has made any acknowledgment of the PSLRA provisions governing the primary issues of this case. It is well high-time U.S. courts accept the law even though it acts to restrict permanent court pronouncements made to pre-result determinations. The U.S. Court of Appeals for The Fifth Circuit has not at this date Ruled the PSLRA law matter since Plaintiff has just recently filed that Appeal (May 5, 2009) of that Texas Court's Final Judgment of Dismissal of Plaintiff's case.

This court must act to preserve Constitutional Integrity as has delivered this law for interpretation because lower courts have been perceptibly loath to address it.

Supporting argument for Question 2 :

The Stipulation was the only place "Governance Provisions" and additional contained terms and conditions were disclosed to the plaintiff-class. Technology was used to effectively exclude the common-plaintiff-class members from realization that Class-Representatives had engaged a conflict of interest in negotiating Defendant Regents' disparate benefit.

The Material Fact that the settlement would occur on terms that protected the merged business interest and shared control of the settling company with The Regents' assigns as elevated into Board of Director's Seats, was essentially an undisclosed secret. The Lead-Plaintiff Regents made the sole decision to settle the action in their self-interest and gained a measure of safety from objection in critical time-periods by keeping the secret. That the court chose that proprietary technology in its disclosure can not be countenanced but that court was not an agent representing the class and is not before the PSLRA law as a defendant.

The Stipulation was effectively unpublished through the encryption of proprietary software and technology access, generally. The End User License Agreement for Adobe Acrobat Reader is

found in the Appendix as entry A-7. Terms of that agreement in paragraph 4. describe contractual acceptance of dysfunction and is well beyond the authority of The Texas Court to mandate, on ordinary citizens, that acceptance of such contract in order to access disclosure of the information these Defendants had reason not to want known, particularly, by those they represented.

With the terms and conditions of the Stipulation as unknowns ; it is, thus, necessarily invalid in the context of this case to defend the court-appointed representatives who kept the terms and conditions unknown to those they represented in order to conceal their misdeeds.

No "Reasonable Man", by the standard that applies to him, would seek an unpublished/unavailable document or drive a thousand miles on assumption that facts had been intentionally withheld and concealed for the purpose of protecting a law violation not enjoined by the presiding court and as perpetrated by its appointees. "Informed Consent" by reasonable men first requires the information be given freely.

Supporting argument for Question 3 :

The Kokkonen v. Guardian Life Insurance Co. of America case-cite is found in the Table of Authorities of this petition as entry 2. It is self-explanatory with regard to self-grants of a court's

jurisdiction without an initial established-basis in law as being outside Due Process. In contemplation of the so-called Continuing Jurisdiction Provision (CJP) of the Dynegy Settlement, the cite describes what must take place as a breach of an agreement in order to establish that ancillary jurisdiction based on the breach of terms being a violation of the Order ; itself, describing the nature of the jurisdiction to be applied as a continuing interest.

In this case, that Texas U.S. District Court should not have been allowed a continuing jurisdiction without some showing of a specific breach of terms of the Stipulation , as a breach of Finality, as might establish that ancillary jurisdiction to all actions derived from events within the Dynegy Settlement.

The Defendants' failure to establish any legitimate Texas Court jurisdiction, as was shown by Plaintiff and universally ignored by the courts, should not be allowed argued to improve-on or obfuscate that failure before this court because the case-cite is conclusive and the damage from undue process, already suffered. In any Defense Counsel counter-move to declare new-basis for jurisdiction of Texas Courts , the issues raised by Plaintiff of invalidity of the Stipulation, itself, should be considered.

Supporting argument for Question 4 :

Generally to 4-A. and 4-B. :

The Collateral Order Doctrine is established for

precisely the reason of limiting the imposition of undue process and to that end, provides for immediate appeal of such qualifying orders. Criteria to demonstrate what constitutes a contestable Order is differently constructed and applied from Circuit to Circuit within the various Courts of Appeal. The criteria list determined for use in the 4th Circuit was discovered on the internet as the same three elements described in Petition for Rehearing En Banc, at page 2, a copy of which is found at Docket Entry No. 44, as copied, in pertinent part, and reformatted below :

> "The doctrine has its genesis in Cohen v. Beneficial Loan Indus. Corp., 337 U.S. 541 (1949). Cohen interpreted 28 U.S.C. 1291 to permit the appeal of orders that "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." Id. at 546. With the test : to be appealable, the order must
> "(1) conclusively determine the disputed question,
> (2) resolve an important issue completely separate from the merits of the action, and
> (3) be effectively unreviewable on appeal from a final judgment." Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy Inc., 506 U.S. 139, 144-45 (1993)."

The Regents of the University of California are a State of California quasi-public entity, an "arm" of the State as admitted by Defendants in Docket Entry No. 7 at page 3 :

> " The Regents is a California state entity granted governance authority by Article IX, Section 9 of the California Constitution over the University of California, including its investment funds.".

While no 11th Amendment cite of immunity has been made in defense, such could have been applied; and , so, the Cohen "small class" criteria are additionally "satisfied" from the perspective of the Puerto Rico Aqueduct case-cite particularly from pages 144-145 as found in Table of Authorities of this petition as entry 5.

The pertinent part : "Once it is established that a State and its "arms" are, in effect, immune from suit in federal court, it follows that the elements of the Cohen collateral order doctrine are satisfied.", as describes the criteria of the doctrine are to be presumed satisfied in this case and no 4th Circuit Court Dismissal of Plaintiff's Appeal should have taken place.

The effect of immunity "from suit in federal court", above, additionally occurs in this case through court refusal to address the case as an action under PSLRA and in the unaddressed Constitutional basis for Civil Mail Fraud Venue as must be Found

to mirror the privileges government prosecutions enjoy or breach the 1st Amendment. While those forms of immunity are not a direct-linkage to the 11th Amendment immunity described, Defendants Counsel's failure to cite the 11th Amendment is itself a means to skirt the issue of Collateral Order Appeal and discard the merits of the case by the transfer to that Texas U.S. District Court's jurisdiction as a defense-defined Collateral Attack on that courts Dynegy Settlement.

In the above criteria list :
The "disputed question" is the transfer. Both interpretation of the CJP and Mail Fraud Venue are "important issues completely separate from the merits of the action". The issues are effectively "unreviewable" because no other court than this court is now privileged to review Mail Fraud and correct the application for West Virginia Federal Courts in Final Judgment or otherwise in this Plaintiff's case. The Fifth Circuit Court if eventually rendering determinations for Plaintiff's Appeal will not be addressing West Virginia Mail Fraud Applications or the misinterpretation of the CJP as each were causes of the transfer.

More specifically to 4-B. :

The U.S.P.S. definition of "fraud" investigated by The Office of The Inspector General, United States Postal Service as a prohibited mailing :

> "A false representation of a matter of fact, whether by words or by conduct, by false or

misleading allegations, or by concealment of a fact which should have been disclosed, which deceives and is intended to deceive another so that they rely on it to their injury."

4-C. It is of imperative public importance that Civil Mail Fraud Venue, in the context of Collateral Order Appeal, be seen as a U.S. Constitution, 1st Ammendment issue because the current rendering of civil-privilege differs from the privilege the government enjoys in criminal prosecution. That difference with regard to applicable venue choices restricts the speech of citizens as not judged entitled to establish venue at the site of U.S. Mail delivery of the fraud.

Citizen speech is thus subjected to prior-restraint because the government itself would be privileged to venue for the same Mail Fraud at that same delivery site and the government is free to speak there (by precedent of Plaintiff's Case-Law cite at Docket Entry No. 13 at pages 2 - 3). Thus, either the government is unentitled to such venue latitude or the citizens are similarly privileged. Reference of the matter to the U.S. Constitution for a solution is offered that in The 1st Amendment "Congress shall make no law ... abridging the freedom of speech ...". There is even a sanction for the event in 42 U.S.C. 1983 when a law rendering by a judicial officer restricts citizen Rights to speech and "declaratory relief was unavailable". A precedent case at Owen vs City of Independence, 445 U.S. 622 (1980) provides in

quotation at page 657 "The innocent individual who is harmed by an abuse of government authority is assured that he will be compensated for his injury.", Table of Authorities entry 4.

Supporting argument for Question 5 :

Because the Complaint and Case was not recognized as a Federal Law violation case based on PSLRA, numerous erroneous conclusions appeared to deny jurisdiction and venue.

The Due Process criteria list, as guides Personal Jurisdiction determinations, found below and in the Constitutional Provisions, Statutes, and Regulations Involved in the Case section of this Petition (entry 13) and in Proposed Findings and Recommendations, Docket Entry No. 16 at page 4 :

> (1) the defendant has created a substantial connection to the forum state by action purposefully directed toward the forum state or otherwise invoking the benefits and protections of the laws of the state; and (2) the exercise of jurisdiction based on those minimum contacts would not offend traditional notions of fair play and substantial justice, taking into account such factors as (a) the burden on the defendant, (b) the interests of the forum state, (c) the plaintiff's interest in obtaining relief, (d) the efficient resolutions of controversies as between states, and (e) the shared interest of the several states in furthering

fundamental substantial social policies.

Clearly, the matter of misleading and omissive documents supporting a Contract and Release within a Federal Court Action delivered by U.S. Postal Service is of greater substance and quality than promotional marketing activities like solicitous phone calls and offers to buy. Solicitous phone calls and mailed offers are more properly described as a Public Nuisance than Mail Fraud. The Magistrate Judge's pages 4 - 5 determination :

> "The mailing of documents to Plaintiff in West Virginia, like the placement of a telephone call to West Virginia, is insufficient to establish that a party has purposefully directed itself to West Virginia to invoke the benefits and protections of West Virginia law."

In this case, the Due Process criteria list supports the idea that a general immunity from civil-action exists to conduct interstate, Mail Fraud in West Virginia as in element (1) "otherwise invoking the benefits and protections of the laws of the state" . Civil Immunity under the law is decidedly a disgraceful benefit and protection offered in West Virginia. Element (2) is supported because there is no "traditional notion of fair play and substantial justice" to be found offended in the terrific and unprecedented scope of modern schemes to defraud. In fact, traditional notions of fair play and substantial justice in regard to class-action fraud would be well-served by wider-jurisdiction and participation of more citizens.

Plaintiff calculated for the 5th Circuit Appeal that this scheme by Defendants and the settling company effectively defrauded the plaintiff-class of ~1.7 billion Dollars in "recognized claim" restitution. Element (2) (a), the California Defendants' burden is no greater in West Virginia than in Texas. This case no longer requires oral argument, testimony of witnesses, or Defendants traveling to the forum state because it has been judged as fully-briefed. Element (2)(b) the interests of the forum state are not served by having its citizens defrauded. Element (2)(c), the Plaintiff's interest could have been served because address of this case in West Virginia would have been presumed to be determined by a neutral court. Element (2)(d), resolution of controversies between states, the Defendant Regents are a California State Entity, California's interest is served by Dismissal. Numerous Texas interests are served by Dismissal and elimination of controversy regarding fraud. The State that does not want to decide the case according to the Federal District Court is West Virginia where some interest in defending its citizens assets from interstate fraud should have been a concern. Element (2)(e), the shared interests of the States, as a fundamental social policy should be to turn-back the wave of corruption that has swept the entire country of its former wealth.

A Constitutional Issue discussion regarding Citizen Rights to the same level of latitude the government has found necessary in prosecution of modern Mail Fraud for The People is described in

The 4th Circuit Court Appeal at page 7 - 9.
5-A. With particular regard to federal judicial system requirements requiring *pro se* litigants interface with the courts through a Magistrate Judge, that early introduction of a law-master to define a non-lawyer's complaint using F.R.C.P. Rule 15(a)(2) "amend provision" as described by the Magistrate Judge in Proposed Findings and Recommendations, Docket Entry No. 16 at page 9, must produce the actual law or rule violations by chapter and paragraph of any citizen allegations "when justice so requires" because non-lawyers do not know the vast collection of laws. When that process fell-short, this Plaintiff necessarily filled-in the chapter and paragraph of those violations, himself ; but, the damage to court sensibilities and a determination to follow where professional Defendants' Counsels led prevailed. Such process failure within the treatment of non-lawyers is an unfortunate bias resulting from the abundance of laws creating more complexity in use than even Magistrate Judge's can master; and, so, results in limitation of Constitutional citizen-access to the courts via the non-lawyer ignorance of what to cite.

It is for this court to determine if Plaintiff expressed the case well-enough for a reasonably knowledgeable District Court Magistrate Judge and supervising District Judge to have correctly extracted the specific law or rule violations as would define operational characteristics for the case ; and , so , the extent of that judicial bias as has created an excess of process. This court is

presumed to see the necessity of appeal caused by a lack of recognition of the applicable law described in a non-lawyer's allegations to a Federal Magistrate Judge.

5-B. Prior to the Memorandum and Order, Docket Entry No. 20, of the West Virginia District Judge, Plaintiff had previously defined the focus of the case as not "centering" around the settlement documents as the primary complaint. The judge's page 2 description :

"The allegations center around documents mailed to him as part of the settlement which he claims were false and fraudulent in that he was misled as to his potential versus actual recovery of losses."

In the previous Objection to the Proposed Findings and Recommendations, Docket Entry No. 17 at page 3, Plaintiff describes :

> "In support of the case as written to focus on Defendants' collusion and fraud, this case is NOT constructed around the simplistic notion of merely receiving mail but that within that mail a contract in Settlement and Release and the supporting , misleading documents , as were later found to be substantially and intentionally flawed."

Plaintiff's case is not described as a mail fraud case, that is a venue issue. The collusion and fraud describe the primary focus of the case. The

Stipulation, for instance, is a "supporting document" that was never mailed to the class. Some of the Defendants' admitted actions in the Dynegy Settlement are described by Plaintiff as fraud in violation of Federal Law. The District Judge's description of Plaintiff's case as "center[ing]" on the mailed documents is erroneous and works against the defining of the ancillary issue of Mail Fraud Venue in Plaintiff's Collateral Order Appeal.

5-C. Counting the calendar days between submission of the Petition for Rehearing En Banc delivered on February 2, 2009 as shown on the Overnight Mail Tracking Receipt in Plaintiff's possession and the March 3, 2009 Denial by The Clerk of The Court of Appeals for the Fourth Circuit, only 29 days elapsed. No notice is given to litigants that Petitions will be Denied via a Local Order to the Clerk ; but, if the Local Order is, for instance, 30-days, no one can know a poll of the other judges would not be asked for on that 30th day. The March 3, 2009 Clerk's Denial is found in the Appendix in this petition as section 5. It is inconceivable that Due Process is served by discarding Plaintiff's effort in preparation of the Petition so easily and as was conceivable not read at all by any judge.

5-D. In frustration this *pro se* litigant desires some clue as to why his overall pursuit of justice has been made so difficult. The possibilities as occur to him are listed in the question though any unexpected court response is welcome.

Supporting argument for Question 6 :

Rationally, if there were no idea of the number of claimants or their losses other than a senseless guess, there would be no basis to know what was a reasonable amount to negotiate for either to produce a target number sufficient to satisfy claimants or to satisfy the settling-company that it is not agreeing to more than is necessary and reasonable. Therefore, the Claimant-Participation Estimate is an extremely important and high-priority for accuracy number to both sides of the negotiation.

In the context of competent and experienced class-action attorneys, we have now been told to believe a variance in that estimate of 5 times or 500% greater participation (as reduced advertised individual restitution by 80%) is reasonably likely as true. In the context of the other Defendants' behaviors described, there is virtually no chance of that proposal being true.

The most likely explanation remains that all contributory deceptions flowed from the same root-cause of negotiating for control within those Board of Director's Seats, at the expense of equitable class monetary restitution, and then to getting away with it.

In Defendants' Motion for Judgment on the Pleadings, Docket Entry No. 39 at page 3 :

> "Under the plan of allocation of proceeds (approved by this court), Plaintiff's claim for losses was calculated at $71,646.96. Because the total losses of class members filing claims exceeded the $473 million of settlement funds, Plaintiff received approximately $15,000.00, or about 21% of his claim."

The Defendants in their admission, admit the Claimant-Participation-Estimate as was defective was causal (with use of word "because") to this Plaintiff's failure to recover what was actually due. Plaintiff would have received the advertised-recovered amount of his "recognized claim" were it not for that estimate having created an inflation of that advertised-value. That value was manipulated to make appearance that the Settlement had produced a large percentage recovery as an inducement to the general plaintiff-class to agree to its published terms. Had a correct estimate been used, the per-claim-share reduction in recovery amount by 80% would likely have been unacceptable to the Class and Class-Members would have been more likely to withdraw from or object to the Settlement.

The Dynegy Settlement used complex formulae to determine "recognized claims" rather than using Class-Members actual losses. The time frame of purchases of Dynegy stock-shares and the sale-dates were accomodated in the formulae to produce the "recognized claim" which by those parameters could be higher or lower than average

on a per-share basis. Plaintiff's "recognized claim" as a percentage of actual-loss was extraordinarily above-average. The promise of the Settlement for all those Class-Members most egregiously effected, by the originating corporate fraud, would have been of high-proportion recovery of actual loss. In Plaintiff's claim, approximately 71% of the actual loss of 100 thousand Dollars was due.

The Defendants' admission, above, is particularly significant because Class-Representatives were responsible for submitting that estimate to the presiding court. The estimate was Defendants' responsibility to be made accurately. The Claims Administrator for the class-action, Gilardi & Co, made statement in the Declaration of Carole K. Sylvester , Docket Entry No. 39, Defense Exhibit K, in items 15 and 18 as reveal that between May 20, 2005 and June 28, 2005 the number of potential claimants increased from 10,791 to 83,100. The indication is that the "recognized claim" calculated per-share recovery amounts, based on the Claimant-Participation-Estimate, as were advertised in the May 11, 2005 Notice of Pendency and Settlement (Notice), as was the inducement to settle, were almost immediately and predictably misleading. Without correction and minimal disclosure, the "recognized claim" amounts became intentionally deceptive.

The factor of five times in the error of the estimate as resulted in 80% reduction of "recognized claim" value in actual-result, in combination with the

other manipulations of information by failure of disclosure or otherwise, create a reasonable suspicion and pattern of events indicating intentional fraud as the more likely than not explanation. That perception is not new as the issue and allegation of a misleading "claim-pool" estimate was made in the Complaint, Docket Entry No. 1 at page 2, and the defective estimate was first admitted (though not in causality, precisely) by Defendants at Docket Entry No. 7 at page 2.

The admission of defective estimate directly contradicts previous versions of Defendants' explanation for the Settlement actual-results as found in Docket Entry No. 9 , Plaintiff's Exhibits P.E. 5 and P.E. 24.

The presence of William Lerach, as convicted of class-action fraud in the Fall of 2007, as The Senior-Partner of Defendant law firm, Lead-Counsel to the Class, during the period of the Settlement , should indicate to this court the credibility of Plaintiff's allegations (see Docket Entry No. 9, P.E. 16).

Supporting argument for Question 7 :

The law provisions below are paraphrased in a seeking of alternate or conccaled meanings. For comparison with the original text of the provisions, they are referenced in Constitutional Provisions, Statutes, and Regulations Involved in the Case within this petition at pages 7-8 and the text in the Appendix section A-6 :

78u-4(a)(2)(A)(iii) describes requirement to serve class interests. The law is violated when a self-interest of Lead-Plaintiff is first acted upon for themselves or through the Lead-Counsel they supervise. To act against the interests of the Class is fraud by abandonment of their duty to actually be representatives (see cite 1, Table of Authorities).

The Defendants appear to admit the act but not the definition at Docket Entry No. 7 at page 3 :

> "The Law Firm received no additional compensation for negotiating the governance provisions regarding those two seats."

Depriving the Class of its opportunity to have its time spent negotiating equitable restitution and then actually spending the time negotiating for Lead-Plaintiff control in the company, is abandonment of duty and not merely poor representation. The Texas Court that presided over Defendants' violations has allowed them and can't correct itself even in hindsight.

78u-4(a)(2)(A)(vi) describes that Lead-Plaintiff will not accept payment beyond the pro-rata share applicable to the other plaintiff's in the class except by an order of the presiding court as confined by paragraph 4, below.

78u-4(a)(4) describes the share in any award of the representative (Lead-Plaintiff) shall be equal , on a per share basis, to that which is recovered by all the others in the Class. The presiding court is allowed to compensate separately the costs and expenses incurred by any acting representative.

There is no allowance made for bargaining for valuable-control in lieu of the cash or cash valued payment to be shared equally with the Class in these laws.

It is understandable why the law was broken. The Defendant Regents probably had lots of shares to protect and protecting, even merging, their interest with the settling company and taking their chances to not get caught, was obviously concluded. Plaintiff has shown they did everything they could to manipulate class-awareness away from objecting or contesting the Settlement.

Plaintiff is aghast. No matter how it is read, the law and fear of the law is supposed to prevent the activity described in the allegations. Technically, 78u-4(a)(4) prevents creation and use of the settlement formulae, themselves, as used to calculate above and below average per-share recoveries because all must share alike. Presumably , actual losses were to be the only measure within the law. There is no Judicial Discretion loophole to allow other than share and share-alike. The signed certificates confirm the knowledge of the law; so, that knowledge is

present and intentional defiance must not be ignored.

The Plaintiff's descriptions are in compliance with F.R.C.P. Rule 9(b) Fraud, Appendix section A-6, and are more than particular enough to establish fraud.

Direct Argument Supporting Grant of The Writ or Final Judgment

Time belonging to the entire class was used in the negotiation for a valuable, disparate benefit as disproportionately gained by Defendant Regents and negotiated by Defendant law firm, Defendant Park was the last Counsel of Record to whom Plaintiff's pre-Complaint inquiry to the Texas Court presiding over the Settlement was directed for response. The negotiation for non-equal-proportion participation in settling company concessions is essentially admitted by Defendants (see : Docket Entry No. 7 at page 3 and cited on page 34 above).

Such class-time should have been used in the performance of Defendants' duty by creation of an accurate Claimant-Participation-Estimate and in negotiating for equitable restitution for the Class and not spent seeking a self-serving separate benefit for Defendant Regents. With regard to that estimate, entries within section A-6 of the

Appendix cites F.R.C.P. Rule 11(c)(3) as provides that a court on its own initiative may order cause to be shown as to how conduct has not violated F.R.C.P. 11(b)(3), evidentiary support of factual contentions, as a route to Rule 11(c)(4) sanction.

The two Board of Director's Seats ceded to the Regents as a disparate benefit, as there created a merged-interest between Lead-Plaintiff and the settling company against the interests of the Class, is the source motivation effecting all other behaviors alleged in Plaintiff's case. The occurrence and acceptance of an inducement to settle the action on terms as would leave the Class effectively without representation is the cause ; and, the Defendants' determination to conceal that inducement by deception, is the effect ; and, how to punish the deception is the problem here for solution.

The representatives devised a plan of distraction via an appearance of equitable restitution to the Class in the Settlement as a Class inducement. That inducement via Plaintiff's apparent 71% recovery of 100,000 Dollar actual-loss, as was supported by specific Settlement Formulae describing an above-average per share amount due in restitution, and the veracity of the calculation, itself, were effected by a false estimate of claimant participation as was used to create the Texas Court's advertisement of its own published estimate of average per-share restitution, in which even that average-value was unpaid to this

Plaintiff for his extraordinary-proportion claim. That advertisement, in support of the Class inducement, caused this Plaintiff and likely other Class-Members to make no timely objection to the Settlement. Defendants effectively admit that amount due to the Plaintiff and causality of the advertised amount differing from actual results as having being produced by that incorrect estimate of claimant participation; and, so, (provided to the Texas Court) as must have been used in the advertisement inducing the settlement (see : Docket Entry No. 9 at P.E. 17). That admission, by using the word "because", precisely indicates that had that estimate been correct within both the negotiation and the advertisement, Plaintiff would have actually received the amount as was due. Providing false information exposes Defendant law firm to potential F.R.C.P. Rule 11(c)(4) sanction for violation of Rule 11(b)(3). The "causation" admission also exposes the lie within all previous Defendants' explanations for actual-result variance.

The failure of full-disclosure of terms, conditions, settling-company concessions on the part of the presiding Texas U.S. District Court was not objected to or supplemented by proper disclosure by Defendants. The Texas Court was not responsible to direct Defendants in how not to break the law (enjoining of a crime ,cite 3, Table of Authorities). Additionally, no disclosure was made as to the inadequacy of the July 2005 Settlement Fund to pay the recognized claims prior to

disbursement in December 2006. The delay in discovery of the fraud, for as long as possible, served the interests of Defendants in making their escape from immediate pursuit by their victims.

The representation by a general disclaimer of claims payable, if differing from advertised expectations as a pro-rata portion in satisfaction, must be based in good-intentions and reasonable circumstances. Neither good-intentions nor reasonable circumstances exist here to explain an 80% reduction of the previously-acceptable, advertised, "recognized claim" amount as was actually due. The partial-payment was accepted provisionally pending further examination by specific endorsement of the settlement check. That further examination was concluded in the filing of the Complaint because the breach describable was so egregious. The West Virginia Court recognized the allegation of Defendants egregious behavior and accepted that the entire sum of uncompensated loss was in controversy. The "disclaimer" matter remains a Defendants' issue within the case but not really in question because the more than $56,000 unpaid remainder of the "recognized claim" was allowed as satisfactorily amended to $85,000 as the uncompensated actual-loss to satisfy subject matter jurisdiction requirements of the Federal Courts. The "disclaimer" matter has , thus, essentially already been Ruled by The West Virginia Court.

For reasons presented in this case, no likelihood exists that the deceptions and manipulation of the

Class perception of the Settlement were other than intentional on the part of Defendants. The intention was to secure that disparate benefit while preventing the flow of information necessary for plaintiff-class-members to recognize the fraud and object to either the Settlement , the failures of representation, or the essential merging of interests of Class-Representatives and the settling company within that company's Corporate Offices.

Plaintiff sees as his burden, under PSLRA , demonstration that a sufficiency of untoward activity occurred in Defendants' behavior, as Class-Representatives, to prove an intention to defraud the class existed within a more likely than not standard. Plaintiff believes he has exceeded that minimal burden in submissions showing a bargaining took place within the Settlement Negotiation to provide valuable disparate benefit to The Defendant Regents, Lead-Plaintiff in that Dynegy Settlement while not effectively disclosing that Material Fact to the Class. That intention is further demonstrated by Defendants withholding of information regarding Class-Participation-Estimate being misleading by a factor of five times as reduced the advertised restitution for this Plaintiff's "recognized claim" by 80% in actual result. On further examination of PSLRA law cited, the use of the formulae used to calculate those "recognized claims" as defined the above or below average entitlements to compensation per share was itself a violation of the "share and share alike" essence of the law.

Plaintiff does not see as his burden any necessity or requirement to prove the amount of specific losses as sustained by the class and himself in the actual payment as having been a direct result of the PSLRA law violations by representatives as there essentially breached the Defendants' contract to serve as his representatives. Even so, presentation is made of Plaintiff's position and the previously-mentioned Finding of The West Virginia Court Magistrate Judge in Docket Entry 16 at page 6, as was endorsed in the Order of the supervising District Judge, that 75 thousand Dollars is sufficiently alleged to be in controversy, as Plaintiff's uncompensated actual-losses. Additionally, reference is made within this Petition to a calculation within The 5th Circuit Court Appeal (page 43 of that Appeal) that total uncompensated class-loss to malicious representation was quantifiable as approximately 1.7 billion Dollars.

With respect to Plaintiff's allegation of malpractice by Defendant law firm , the "causation" (commonly referred to as proving a "case within a case") resultant from their actions and inactions in abandonment of their duty did produce a different result than that which would have otherwise taken place. That causation is demonstrated in the failure of full-disclosure of settling-company settlement concessions to the Class by the Defendant law firm, as Lead-Counsel, there committed in order to manipulate the information as would certainly, if known, have been manifested

in Plaintiff's timely objection or appeal based on the conficts-of-interest within the Settlement.

What Is Sought From This Court :

The "hard-core" solution is forced disgorgement of ill-gotten gains ; but , the clock can not be turned-back to account for the damage done to Justice, several thousand Class-Members, or to this Plaintiff's health as broken by fighting all these people constantly for a year and a half and living with awareness of the injustice since December 2006. Plaintiff calculated the 2005 value of the two Board of Director's Seats as 339 million Dollars (Docket Entry No. 9, Explanation of Exhibits, at page 3). Even forfeiture of that enormous sum would not be disincentive enough to prevent re-occurrence because these sort of folks don't get-it and are caught so seldom. That calculation also yields a proportional sum as would be necessary for this Plaintiff to share and share alike with the Defendant Regents. That result of nearly 424 thousand Dollars is by no means an inappropriate sharing of their separate prize.

Hopefully, this court will take-over the whole case including The 5th Circuit Court appeal by rendering the transfer to Texas illegitimate and so that appeal made moot. Plaintiff's desire is for this court to render Final Judgment.

This Plaintiff previously suggested three confining provisions as could alter the Class-Action fraud business. The two versions of those provisions are found in Docket Entry No. 8 at pages 2 - 3 and

Docket Entry No. 13 at pages 6-7. The latter version is of more refined thought.

Of course, Plaintiff seeks compensation, the $85,000 in dispute per Docket Entry No. 15, at pages 5-6, and the accumulated interest.

Plaintiff desires punitive damages or whatever the court will allow as injury and suffering.

Plaintiff seeks allowable compensation for his time in preparation and costs involved in acting as his own attorney, including court costs.

Plaintiff seeks Constitutional rendering of civil mail-fraud as mirroring the ability of the government's prosecutions. The applicable standard to then remain the same for both civil and criminal cases as in the cite found in Docket Entry No. 13 at pages 2 - 3, as, "... the whole may be tried where any part can be proved to have been done.". The effect civilly, would be proof of fraud by mail shown to a court's satisfaction before venue is decided ; and, so, where that court satisfaction is gained, venue may be at the jurisdiction of delivery of the fraud. Alternatively, within the necessary interpretation of PSLRA , a conditional statement in the Judgment Opinion of

this court could be crafted to allow Federal Jurisdiction and Venue at the location of the victim in matters related to the three PSLRA provisions cited. In itself, such a conditional Ruling may be a sufficient disincentive to others to ever again consider perpetrating these acts. Such is seen as potentially completing the reform of the class-action business and the intention of the other two branches of government.

Charles W. Birks 5/31/2009

Signature of Petitioner, *pro se* date

Charles W. Birks
1586 Dry Ridge Rd.
Walton, WV 25286
304-577-6610

Appendix

A-1. 4th Circuit Court of Appeals Judgment of January 20, 2009 as DISMISSED Plaintiff's Appeal :

FILED: January 20, 2009
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 08-2074 (2:07-cv-00742)
CHARLES
W. BIRKS,
Plaintiff - Appellant
KEITH F. PARK, Esquire;
LLP; THE REGENTS OF THE
COUGHLIN STOIA GELLER RUDMAN &
ROBBINS
UNIVERSITY OF CALIFORNIA,
Defendants - Appellees

JUDGMENT

In accordance with the decision of this Court, this appeal is dismissed.
This judgment shall take effect upon issuance of this Court's mandate in accordance with Fed, R. App. 41.
/s/ PATRICIA S. Conner, CLERK

A-2. 4th Circuit Court of Appeals per curiam opinion supporting Dismissal of Plaintiff's

Appeal as of January 20, 2009 :

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 08-2074
CHARLES W. BIRKS,
Plaintiff - Appellant,
v.
KEITH F. PARK,
ROBBINS LLP; THE
Esquire; COUGHLIN STOIA GELLER RUDMAN
&
REGENTS OF THE UNIVERSITY OF
CALIFORNIA,
Defendants - Appellees.

Appeal from the United States District Court for the Southern
District of West Virginia, at Charleston. Joseph R. Goodwin,
Chief District Judge. (2:O7-cv-O0742)

Submitted: December
2008 Decided: January 20, 2009

Before NIEMEYER, MICHAEL, and AGEE,
Circuit Judges.
Dismissed by unpublished per curiae opinion.

Charles W. Birks, Appellant Pro Se. Kathy Dawn Patrick, GIBBS &
BRUNS, LLP, Houston, Texas, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Charles W. Birks seeks to appeal the district court's order adopting the recommendation of the magistrate judge and transferring Birks's action to the United States District Court Southern District of Texas, Houston Division. This court may exercise jurisdiction only over final orders, 28 U.S.C. 1291 (2000), and certain interlocutory and collateral orders, 28 U.S.C. 1292 (2000); Fed. R. Civ. P. 54(b); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949). The order Birks seeks to appeal is neither a final order nor an appealable interlocutory or collateral order. Accordingly, we grant Appellees' motion to dismiss the appeal for lack of jurisdiction and deny as moot Birks's motion for injunctive relief. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before court and argument would not aid the decisional process.

DISMISSED

A-3. West Virginia U.S. District Court
Magistrate Judge's Proposed Findings and Recommendations of July 8, 2008 :

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
CHARLESTON

CHARLES W. BIRKS,
Plaintiff,

Case No.

v. 2:07-cv-00742

KEITH F. PARK, ESQ., COUGHLIN STOIA GELLER RUDMAN & ROBBINS LLP, and THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Defendants.

PROPOSED FINDINGS AND RECOMMENDATIONS

Plaintiff, Charles W. Birks, proceeding pro se , filed this action on November 19, 2007, claiming that he is the victim of legal malpractice and fraud in violation of federal law. (Complaint, docket # 1.) His claims arise out of the settlement of a class action in which Plaintiff was a member, In re Dynegy, Inc. Securities Litigation, Master File NO. H-02-1571 (S.D. Tex. July 8, 2005). He paid the filing fee and served the summonses through the West Virginia Secretary of State. (## 1-5.) This action is assigned to the Hon. John T. Copenhaver, Jr., United States District Judge, and referred to the undersigned by Standing Order (# 2).

Pending before the court is Defendants' Motion to Dismiss (# 6), supported by a memorandum (# 7). Plaintiff responded in opposition (# 8), and Defendants filed a Reply (# 12). Plaintiff, without leave of court, filed a Reply (# 13), which the court will consider, because Plaintiff is a *pro se* litigant.

Defendants cite four grounds for their motion to dismiss:
(1) this court lacks personal jurisdiction over The Regents of the

University of California ("Regents");
(2) this court lacks subject matter jurisdiction;
(3) venue is improper in this District; and
(4) the complaint fails to comply with Rules 9(b) and 10(b), *Fed. R. Civ. P.* (Motion, # 6.)

Plaintiff's complaint contains an introduction, which summarizes the basis for his claims as follows:

The Plaintiff asserts that he was unpaid a remainder in excess of $56,000 and seeks restitution and damages as specified below and costs as a result of a mishandled Class-Action Lawsuit, of which the Plaintiff was a Class-Member. The Regents of the University of California (The Regents) were appointed Lead-Plaintiffs in that Class- Action. A Settlement was negotiated by/for the above named Defendants in this complaint AND the Class in United States District Court, Southern District of Texas (Master File No. H-02-1571). Further, that Mr. Keith Park, ESQ, as listed as a partner of the law firm and the Attorney of Record for Lead-Plaintiffs in the above Class-Action, AND that law firm formerly known as Lerach Coughlin Stoia Geller Rudman & Robbins LLP (the firm) previously located at 401 B Street, Suite 1600 San Diego, California 92101 WERE IN FACT also this Plaintiff's Counsel as the firm was appointed as Lead-Counsel for the Class. Through whom, materially false representations were made to this Plaintiff as to the Settlement Amount to be received and then only a de minimus portion was actually paid of that specific agreeable amount. AND THAT FACT was discovered less than one year from the date of this submission to the West Virginia District

Court; as, the distribution of the defective Settlement was perpetrated by use of the US Postal Service at the Plaintiff's West Virginia permanent address; first, by Settlement Cheque bearing a November 22, 2006 initial date; and, later by Shares Certificate. The total negotiable amount of cheque plus shares was around $15,000 at the time of receipt.
(Complaint, # 1, at 1-2.)

It appears that Plaintiff alleges that (a) his total loss based on his investments in Dynegy was more than $100,000, and his proof of claim was more than $71,000; (b) his participation in the class action was based on his understanding that he would receive the loss recognized by the Claims Administrator as set forth in his proof of claim; (c) he is offended by the settlement's provision that the Regents would control two seats on Dynegy's board of directors; and (d) the settlement documents concealed the provision concerning the Regents gaining two seats on the board. Id., at 2. Plaintiff contends that the restitution to shareholders was adversely affected by the agreement that the Regents would control the two board seats. Id.

Personal Jurisdiction

The Regents contend that they have had no contact with West Virginia and that it would be a violation of due process to require the Regents to answer process here, citing Branch Bank and Trust v. Engine Components, Inc., 394 F. Supp.2d 859, 861 (S.D. W. Va. 2005). (Mem., # 7, at 3-4.)

Plaintiff responds that as Lead Plaintiffs in the

class action, the Regents had responsibility to others and should be considered "jurisdictionally omnipresent." (Response, # 8, at 1.)
He particularly points to the mailing of the class action notice documents to himself in West Virginia. Id.

The Regents' reply argues that mailings to West Virginia are insufficient to meet the criteria for personal jurisdiction. (Reply, # 12, at 3-4.)

Plaintiff's surreply criticizes the Regents for citing to an unpublished opinion, and cites to cases concerning the mail fraud statute. (Surreply, # 13, at 1-5.)

To determine whether it is a violation of due process for Plaintiff to sue the Regents in West Virginia, the court must determine whether:

> (1) the defendant has created a substantial connection to the forum state by action purposefully directed toward the forum state or otherwise invoking the benefits and protections of the laws of the state; and (2) the exercise of jurisdiction based on those minimum contacts would not offend traditional notions of fair play and substantial justice, taking into account such factors as (a) the burden on the defendant, (b) the interests of the forum state, (c) the plaintiff's interest in obtaining relief, (d) the efficient resolutions of controversies as between states, and (e) the shared interest of the several states in furthering fundamental substantial social policies.

Lesnick v. Hollingsworth & Vose Co., 35 F.3d 939, 945-46 (4th Cir. 1994); Branch Bank and Trust v. Engine Components, Inc., 394 F. Supp.2d 859, 861 (S.D. W. Va. 2005).

The mailing of documents to Plaintiff in West Virginia, like the placement of a telephone call to West Virginia, is insufficient to establish that a party has purposefully directed itself to West Virginia to invoke the benefits and protections of West Virginia laws. In Faulker v. Carowinds Amusement Park, 867 F. Supp. 419, 424 (S.D. W. Va. 1994), promotional and marketing activities in West Virginia for an amusement park in North Carolina were held to be insufficient to support the exercise of jurisdiction. In Stover v. O'Connell Assoc., Inc., 84 F.3d 132, 136 (4th Cir. 1996), the Fourth Circuit held that "[t]he linchpin for long-arm jurisdiction . . . is the quantity and quality of the defendant's activity *in the forum state.*" [Emphasis in the original.] The placing of telephone calls to a state did not subject the caller to jurisdiction in that state. 84 F.3d at 137. Plaintiff's reference to the mail fraud statute does not aid his argument; the mail fraud statute is criminal, and it permits prosecution in either the district of the mailing or the delivery of the item.

The undersigned proposes that the presiding District Judge **FIND** that this court lacks personal jurisdiction over the Regents of the University of California.

Subject Matter Jurisdiction

All defendants argue that Plaintiff's complaint fails to assert that $75,000 is in controversy, and

therefore the court lacks subject matter jurisdiction. (Mem., # 7, at 4-5.)

The complaint lacks a concise statement of Plaintiff's request for relief. Plaintiff's response to the motion clarifies that he is "suing for basis $85,000 which is the $100,000 actually lost minus the $15,000 actually paid." (Response, # 8, at 6.)

The undersigned proposes that the presiding District Judge **FIND** that Plaintiff, a *pro se* litigant, who should be given the benefit of the doubt with respect to technical aspect of pleading, has sufficiently alleged that $75,000 is in controversy.

Venue

All of the defendants argue that venue does not lie in the Southern District of West Virginia, but does lie in the Southern District of Texas, where the class action was adjudicated, or in California, where all the defendants reside/exist. (Mem., # 7, at 5-7.) They note that Plaintiff is a member of the class the claims of which were adjudicated and settled by the U.S. District Court for the Southern District of Texas at Houston. The Order and Final Judgment entered by the Hon. Sim Lake on July 8, 2005, contains the following provision:

> 14. Without affecting this Order and Final Judgment's finality in any way, this Court hereby retains continuing jurisdiction

> over: (i) this Settlement's implementation and any award or distribution of the Settlement Fund, including interest earned thereon; (ii) the Settlement Fund's disposition; (iii) all Parties for the purpose of construing, enforcing and administering the Stipulation and the releases contained therein; (iv) hearing and determining applications by Plaintiffs' Counsel for attorneys' fees, costs, expenses, including expert fees and costs, and interest; (v) hearing and ruling on any proposed plan of distribution of settlement proceeds; and (vi) the Action until the Order and Final Judgment has become effective and each and every act agreed to be performed by the Parties has been performed under the Stipulation.

(Motion, # 6-2 at 8, Ex. 1 at 6.)

It appears that Plaintiff combined his arguments concerning personal jurisdiction over the Regents with his opposition to a change of venue. The undersigned has not discerned a separate argument in opposition to transfer. The venue statute provides that in a case in which jurisdiction is based only on diversity of citizenship, the suit may be filed in:

> (1) a judicial district where any defendant resides, if all defendants reside in the same State,
>
> (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is

situated, or

(3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought.

28 U.S.C. § 1391(a).

Under subparagraph (1), venue lies in the State of California. Because Plaintiff is complaining about the negotiation of the settlement, and the disclosure of its terms, it appears that the events giving rise to the claim occurred in the State of California and the Southern District of Texas. It appears that Plaintiff is challenging the amount and distribution of the Settlement Fund, which triggers Judge Lake's retention of jurisdiction over the class action.

Accordingly, the undersigned proposes that the presiding District Judge **FIND** that venue lies in the Southern District of Texas, Houston Division, or in one of the Districts of California, and not in the Southern District of West Virginia.

Rules 9 (Fraud) and 10 (Form)

Defendants contend that Plaintiff has failed to plead fraud with particularity, as required by Rule 9 (b), *Fed. R. Civ. P.* It is well settled that the circumstances constituting fraud that must be pled include "the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what he obtained thereby." Harrison v. Westinghouse

Savannah River Co., 176 F.3d 776, 784 (4th Cir. 1999). Plaintiff has submitted voluminous exhibits in opposition at docket # 9. Matters outside the complaint are irrelevant; the allegations in the complaint are those which must meet Rule 9(b)'s pleading standard. Miller v. Gain Fin., Inc., 995 F.2d 706, 709 (7th Cir. 1993).

Plaintiff, as a member of the class action, received a limited number of documents in connection with the litigation. It appears that he complains that those documents were false and fraudulent in that he was misled as to his potential versus actual recovery of losses, and that the Regents received something of value which other members of the class did not receive (the two board seats), and that the two board seats contributed to a reduction in the settlement fund. The last allegation may constitute a claim that the Regents had a conflict of interest with the rest of the class.

It is true that Plaintiff's complaint does not conform to the requirements of Rule 10, with separate paragraphs and short and plain statements of his claims. However, Rule 15(a), *Fed. R. Civ. P.* , provides that "[t]he court should freely give leave [to amend] when justice so requires."

The undersigned proposes that the presiding District Judge **FIND** that Plaintiff's complaint does not comply fully with the requirements of Rules 9 and 10, but that the deficiencies should be addressed by the court which ultimately adjudicates Plaintiff's

claims.

Recommendation

It is respectfully **RECOMMENDED** that, due to the lack of venue in this district, and pursuant to 28 U.S.C. § 1404(a), this action be transferred to the Southern District of Texas, Houston Division, and that Defendants' Motion to Dismiss be denied without prejudice.

This court should not determine whether the Southern District of Texas has personal jurisdiction over the Regents. Other deficiencies in Plaintiff's complaint can be addressed by the court with jurisdiction over the action.

Notice

The parties are notified that this Proposed Findings and Recommendation is hereby **FILED**, and a copy will be submitted to the Honorable John T. Copenhaver, Jr., United States District Judge. Pursuant to the provisions of Title 28, United States Code, Section 636(b)(1)(B), and Rules 6(e) and 72(b), Federal Rules of Civil Procedure, the parties shall have ten days (filing of objections), and then three days (service/mailing), from the date of filing this Proposed Findings and Recommendation within which to file with the Clerk of this court, specific written objections, identifying the portions of the Proposed Findings and Recommendation to which objection is made, and the basis of such objection. Extension of this

time period may be granted for good cause shown.

Failure to file written objections as set forth above shall constitute a waiver of de novo review by the district court and a waiver of appellate review by the circuit court of appeals. Snyder v. Ridenour, 889 F.2d 1363, 1366 (4th Cir. 1989); Thomas v. Arn, 474 U.S. 140, 155 (1985); Wright v. Collins, 766 F.2d 841, 846 (4th Cir. 1985); United States v. Schronce, 727 F.2d 91, 94 (4th Cir. 1984). Copies of such objections shall be served on opposing parties, Judge Copenhaver, and this Magistrate Judge.

The Clerk is directed to file this Proposed Findings and Recommendation and to mail a copy of the same to Plaintiff and counsel of record.

July 8, 2008
Date

s/ Mary E. Stanley
Mary E. Stanley
United States Magistrate Judge

A-4. West Virginia U.S. District Court District Judge's Memorandum Opinion and Order of August 19, 2008 :

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA CHARLESTON DIVISION

CHARLES W. BIRKS,
Plaintiff,

v.

CIVIL ACTION NO. 2:07-cv-00742

KEITH F. PARK et al.,
Defendants.

MEMORANDUM AND ORDER

Pending is the defendant's motion to dismiss (Docket 6).

This action was referred to the Honorable Mary E. Stanley, United States Magistrate Judge, for submission to this court of proposed findings of fact and recommendation ("PF&R") for disposition,

pursuant to 28 U.S.C. § 636(b)(1)(B). On July 8, 2008, the Magistrate Judge submitted proposed findings of fact and recommended that due to lack of venue in this district, and pursuant to 28 U. S. C. §1404(a), this action be transferred to the Southern District of Texas, Houston Division, and the defendants' motion be denied without prejudice. The Magistrate Judge further recommended that this court should not determine whether the Southern District of Texas has personal jurisdiction over the Regents, a defendant in this action. Deficiencies in the plaintiff's complaint were recommended to be addressed by the court with jurisdiction over the action. On July 18, 2008, the plaintiff filed objections to the Magistrate Judge's PF&R.

Statement of Facts

The plaintiff, Charles W. Birks, proceeding *pro se*, filed a complaint on November 19, 2007, alleging he is the victim of legal malpractice and fraud in violation of federal law. His claims arise out of the settlement of a securities class action filed in 2002 in which the plaintiff was a member. The Honorable Sim Lake, United States District Judge for the Southern District of Texas, Houston Division, handled the class action styled *In Re: Dynegy, Inc. Securities Litigation* in which Dynegy, a Texas-domiciled corporation, and others allegedly violated federal securities laws. The Regents of the University of California ("Regents") were appointed as the Lead Plaintiff. Coughlin, Stoia, Geller, Rudman & Robbins ("Law Firm") was appointed as Lead Counsel.

The plaintiff alleges that the Law Firm and Keith F. Park, a member of the Law Firm, committed malpractice and they, along with the Regents, committed fraud. The allegations center around documents mailed to him as part of the settlement which he claims were false and fraudulent in that he was misled as to his potential versus actual recovery of losses. He also argues that the Regents received something of value which other members of the class did not receive when they were appointed two seats on the board of Dynegy, Inc. and this fact was allegedly concealed in the settlement documents. He alleges he could not and did not make a fully informed decision concerning his participation in the class without these facts and he was precluded from opting out of the class at the time he was made aware of this information. He further contends that the appointment of the two board seats led to a reduction in the settlement fund and thus restitution to shareholders in the class was adversely affected.

The defendants filed a motion to dismiss citing four grounds: (1) this court lacks personal jurisdiction over the Regents; (2) this court lacks subject matter jurisdiction; (3) venue is improper in this District; and (4) the complaint fails to comply with Rules 9(b) and 10(b) of the Federal Rules of Civil Procedure. The plaintiff responded in opposition and the defendants filed a reply. The plaintiff, without leave of court, filed a reply which the court considered in fairness to the plaintiff as a *pro se* litigant.

Analysis

The plaintiff's numerous and lengthy objections to the PF&R commingle "evidence" and further argument as to the causes of action in his complaint with limited rebuttal of the Magistrate Judge's findings on the key issues of jurisdiction and venue. The plaintiff has not proffered any further argument which persuades this court from agreement with the Magistrate Judge's conclusion that transfer of this action to the Southern District of Texas, Houston Division, is the most proper course of action at this time.

The plaintiff's reiterates that his causes of action are not in and of themselves a revisitation of the settlement itself. Given, however, that his allegations of malpractice and fraud on behalf of the lead counsel and lead plaintiff relate to actions intertwined with the timing, terms and material contents of settlement documents, the settlement itself is inextricably involved. The July 8, 2005, Order and Final Judgment entered by Judge Lake contains the following pertinent provision:

> 14. Without affecting this Order and Final Judgment's finality in any way, this Court hereby retains continuing jurisdiction over: (I) this Settlement's implementation and any award or distribution of the Settlement Fund, including interest earned thereon; (ii) the Settlement Fund's disposition; (iii) all Parties for the purpose of construing, enforcing and administering the Stipulation and the releases contained therein; (iv) hearing and determining applications by

Plaintiffs' Counsel for attorneys' fees, costs, expenses, including expert fees and costs, and interest; (v) hearing and ruling on any proposed plan of distribution of settlement proceeds; (vi) the Action until the Order and Final Judgment has become effective and each and every act agreed to be performed by the Parties has been performed under the Stipulation.

(Motion, Ex. 1 at 6).

In sum, this provision may contemplate continuing jurisdiction over the allegations in the plaintiff's complaint. The better course of action is to allow Judge Lake to make that determination in the first instance. If this action is beyond the scope of Judge Lake's order it may be re-transferred to this court for further proceedings.

Conclusion

In accordance with the above discussion, the court adopts and incorporates herein the Magistrate Judge's proposed findings of fact and recommendation and **ORDERS** as follows:

(1) that this action be transferred to the Southern District of Texas, Houston Division; and

(2) that the defendant's motion to dismiss is **DENIED** without prejudice.

The court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any

unrepresented party.

ENTER: August 19, 2008

S/ Joseph R. Goodwin
Joseph R. Goodwin, Chief Judge

A-5. 4th Circuit Court of Appeals DENIAL by The Clerk of Plaintiff's Petition for Rehearing En Banc as Denied March 3, 2009

FILED: March 3, 2009
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 08-2074 (2:07-cv-0O742)
CHARLES W. BIRKS
Plaintiff - Appellant
KEITH F. PARK, Esquire; COUGHLIN STOIA GELLER RUDMAN & ROBBINS LLP; THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,
Defendants - Appellees

ORDER
The petition rehearing en banc was circulated to the full Court. No judge requested a poll under Fed. R. App. P. 35.
The Court denies the petition for rehearing en banc.
For the Court
/s/ Patricia S. Connor, Clerk

A-6. Constitutional Provisions , Statutes , Rules , and Regulations in the Case :

1. U.S. Constitution First Amendment : Q-5

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. U.S. Constitution Eleventh Amendment : Q-5

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

3. 28 U.S.C. 1294(1) :

"Except as provided in sections 1292(c), 1292(d), and 1295 of this title, appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows:
(1) From a district court of the United States to the court of appeals for the circuit embracing the district;"

4. 28 U.S.C. 1651 : Cited page

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of

their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

5. 28 U.S. C. 2101(e) : Cited page

"(e) An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment."

6. PSLRA §78u-4(a)(2)(A) :

"(2) Certification filed with complaint

(A) In general

Each plaintiff seeking to serve as a representative party on behalf of a class shall provide a sworn certification, which shall be personally signed by such plaintiff and filed with the complaint, that-

(i) states that the plaintiff has reviewed the complaint and authorized its filing;

(ii) states that the plaintiff did not purchase the security that is the subject of the complaint at the direction of plaintiff's counsel or in order to participate in any private action arising under this chapter;

(iii) states that the plaintiff is willing to serve as a representative party on

behalf of a class, including providing testimony at deposition and trial, if necessary;

(iv) sets forth all of the transactions of the plaintiff in the security that is the subject of the complaint during the class period specified in the complaint;

(v) identifies any other action under this chapter, filed during the 3-year period preceding the date on which the certification is signed by the plaintiff, in which the plaintiff has sought to serve as a representative party on behalf of a class; and

(vi) states that the plaintiff will not accept any payment for serving as a representative party on behalf of a class beyond the plaintiff's pro rata share of any recovery, except as ordered or approved by the court in accordance with paragraph (4)."

7. Particularly - §78u-4(a)(2)(A)(iii) :

"(iii) states that the plaintiff is willing to serve as a representative party on behalf of a class, including providing testimony at deposition and trial, if necessary;"

8. PSLRA §78u-4(a)(4) :

"(4) Recovery by plaintiffs

The share of any final judgment or of any

settlement that is awarded to a representative party serving on behalf of a class shall be equal, on a per share basis, to the portion of the final judgment or settlement awarded to all other members of the class. Nothing in this paragraph shall be construed to limit the award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of a class."

9. Federal Rules of Civil Procedure Rule 11(b)(2)

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

10. Federal Rules of Civil Procedure Rule 11(b)(3)

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

11. Federal Rules of Civil Procedure Rule 11(c)(3)

(3) On the Court's Initiative.
On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).

12. Federal Rules of Civil Procedure Rule 11(c)(4)

(4) Nature of a Sanction.
A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

13. Description of Due Process Criteria found in Proposed Findings and Recommendations, Docket Entry No. 16 at page 4 :

(1) the defendant has created a substantial connection to the forum state by action purposefully directed toward the forum state or otherwise invoking the benefits and protections of the laws of the state; and (2) the exercise of jurisdiction based on those minimum contacts would not offend traditional notions of fair play and substantial justice, taking into account such factors as (a) the burden on the defendant, (b) the interests of the forum state, (c) the plaintiff's interest in obtaining relief, (d) the efficient resolutions of controversies as between states, and (e) the shared interest of the several states in furthering fundamental substantial social policies.

A-7. Adobe Acrobat Reader, End User Licence Agreement (EULA) :

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ELECTRONIC END USER LICENSE
AGREEMENT
FOR ADOBE ACROBAT READER**

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A-8. Recent Docket Sheet for the case as was compiled by U.S. District Court, Southern District of Texas, Houston Division for Plaintiff's appeal in The 5th Circuit Court of Appeals with Digital Record page number identifiers :

Reformatted Docket Sheet

For each entry : Filing Date, Digital Record Page Number Entry Number, Docket Text

11/19/2007
(p.9) Entry #1
COMPLAINT for Malpractice and Fraud in Violation of Federal Law.
Filing Fee $350.00. Receipt # 21339.
(Attachment: # (1) Civil Cover Sheet) (taq)
(Entered: 11/21/2007) 11/19/2007 CASE assigned to Judge John T. Copenhaver, Jr. (ras) (Entered:

11/21/2007)

11/21/2007
(p.14) Entry #2
STANDING ORDER IN RE: ASSIGNMENT AND REFERRAL OF CIVIL ACTIONS AND MATTERS TO MAGISTRATE JUDGES ENTERED AUGUST 1, 2006. This case is referred to Magistrate Judge Mary E. Stanley for Findings of Fact and Recommendations for disposition. (cc:attys; any unrepresented party) (taq) (Entered: 11/21/2007)

12/3/2007
(p.16) Entry #3
SUMMONS ISSUED by the Clerk on behalf of Charles W. Birks for Keith F. Park, The Regents of the University of California, re: [1] Complaint, returnable 20 days. Original Summons and 1 copy for each defendant mailed to plaintiff for service. (taq) (Entered: 12/3/2007)

2/6/2008
(p.18) Entry #4
SUMMONS RETURNED EXECUTED BY SECRETARY OF STATE
as to Keith F. Park re: [1] Complaint. Accepted by Secretary of State on 1/28/2008 as to Keith F. Park; certified mail, return receipt card signed on behalf of said defendant on 2/1/2008; answer due 2/21/2008. (taq) (Entered: 2/6/2008)

2/6/2008
(p.22) Entry #5
SUMMONS RETURNED EXECUTED BY SECRETARY OF STATE
as to The Regents of the University of California re: [1] Complaint. Accepted by Secretary of State on 1/28/2008 as to The Regents of the University of California; certified mail, return receipt card signed on behalf of said defendant on 1/31/2008; answer due 2/20/2008. (taq) (Entered: 2/6/2008)

2/19/2008
(p.26) Entry #6
MOTION by Keith F. Park, Coughlin Stoia Geller Rudman & Robbins LLP, Regents of the University of California to Dismiss (Attachments: # (1) Exhibit 1, # (2) Exhibit 2) Motion referred to Magistrate Judge Mary E. Stanley. (Del Giudice, Michael) (Modified on 2/19/2008 to add additional filers and to add description to exhibits) (skh). (Entered:
2/19/2008)

2/19/2008
(p.97) Entry #7
MEMORANDUM by Keith F. Park, Coughlin Stoia Geller Rudman & Robbins LLP, Regents of the University of California in support of [6] MOTION by Keith F. Park, Coughlin Stoia Geller Rudman & Robbins LLP, Regents of the University of California to Dismiss (Del Giudice, Michael) (Modified on 2/19/2008 to add additional filers) (skh). (Entered: 2/19/2008)

3/10/2008
(p.106) Entry #8
REBUTTAL by Charles W. Birks in opposition of [6] MOTION by Keith F. Park, Coughlin Stoia Geller Rudman & Robbins LLP, Regents of the University of California to Dismiss. (mkw) (Entered: 3/11/2008)

3/10/2008
(p.112) Entry #9
EXHIBITS by Charles W. Birks in support of [8] REBUTTAL to Motion to Dismiss. (Attachments: # (1) Continuation, # (2) Continuation, # (3) Continuation, # (4) Continuation, # (5) Continuation) (mkw) (Entered: 3/11/2008)

3/10/2008
(p.214) Entry #10 CERTIFICATE OF SERVICE filed by Charles W. Birks for documents [8] and [9]. (mkw) (Entered: 3/11/2008)

3/18/2008
(p.215) Entry #11
REPLY by Keith F. Park, Coughlin Stoia Geller Rudman & Robbins LLP, Regents of the University of California to [8] Response In Opposition. (Attachments: # (1) Exhibit(s) 1)(Del Giudice, Michael) (Modified on 3/18/2008 to add additional filers) (skh). (Entered: 3/18/2008)

3/18/2008
(p.225) Entry #12
AMENDED AND CORRECTED REPLY by Keith F. Park, Coughlin Stoia Geller Rudman & Robbins LLP, Regents of the University of California to [8] Response In Opposition. (Attachments: # (1) Exhibit (s) 1)(Del Giudice, Michael) (Modified text to conform to filed document and added additional filers on 3/18/2008) (skh). (Entered: 3/18/20

3/28/2008
(p.235) Entry #13
REPLY by Charles W. Birks to defendants' [12] AMENDED AND CORRECTED REPLY MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS. (taq) (Entered: 3/28/2008)

5/7/2008
(p.248) Entry #14
NOTICE AND ORDER notifying the plaintiff that he has a right to file a response to the [6] Motion to dismiss; directing that the plaintiff's response shall be filed by 05/21/08; Defendants' replies, if any, shall be filed by 06/05/08. Signed by Magistrate Judge Mary E. Stanley on 5/7/2008. (cc: plaintiff, attys) (mkw) VACATED pursuant to the [15] Order entered 5/8/2008. (Modified on 5/8/2008 to note order has been vacated) (skh). (Entered: 5/7/2008)

5/8/2008
(p.250) Entry #15

ORDER: the [14] notice and order entered on 5/7/2008 is VACATED for the reason that defendant's motion to dismiss has been fully briefed. Signed by Magistrate Judge Mary E. Stanley on 5/8/2008. (cc: plaintiff; attys) (skh) (Entered: 5/8/2008)

7/8/2008
(p.251) Entry #16
PROPOSED FINDINGS AND RECOMMENDATION recommending that due to lack of venue in this district, and pursuant to 28 U.S.C. 1404 (a), this action be transferred to the Southern District of Texas, Houston Division and that defendant's [6] MOTION by Keith F. Park, Coughlin Stoia Geller Rudman & Robbins LLP, Regents of the University of California to Dismiss be denied without prejudice. This case no longer referred to Magistrate Judge Mary E. Stanley. Objections to Proposed F&R due by 7/25/2008. Signed by Magistrate Judge Mary E. Stanley on 7/8/2008. (cc: attys; plaintiff) (tmr) (Entered: 7/8/2008)

7/18/2008
(p.261) Entry #17 OBJECTION to [16] Proposed Findings and Recommendation by Charles W. Birks. (mkw) (Entered: 7/18/2008)

7/25/2008
(p.270) Entry #18
ORDER directing the clerk to reassign this civil action to another judicial officer in this district.

Signed by Judge John T. Copenhaver, Jr. on 7/25/2008. (cc: attys; any unrepresented parties) (mkw) (Entered: 7/25/2008)

7/29/2008
(p.271) Entry #19
CLERK'S ORDER REASSIGNING CASE. Case reassigned from Judge John T. Copenhaver, Jr. to Judge Joseph R. Goodwin for all further proceedings. (cc: attys; any unrepresented party; Judge) Signed by Clerk of Court Teresa L. Deppner on 7/29/2008. (taq) (Entered: 7/29/2008)

8/19/2008
(p.272) Entry #20
MEMORANDUM AND ORDER adopting and incorporating Magistrate Judge Stanley's [16] Proposed Findings and Recommendation; directing as follows: that this action be transferred to the Southern District of Texas, Houston Division; denying defendants' [6] MOTION to Dismiss without prejudice. Signed by Judge Joseph R. Goodwin on 8/19/2008. (cc: attys; any unrepresented party) (mkw) (Modified on 8/19/2008 to clarify text) (mkw). (Entered: 8/19/2008)

8/29/2008
(p.276) Entry #21
LETTER to Clerk, USDC/SDTX, from Clerk, USDC/SDWV dated 8/29/2008, re: transmitting original case file pursuant to the [20] Memorandum and Order entered 08/19/08

transferring this action to the U.S. District Court for the Southern District of Texas, Houston Division. (mkw) (Entered: 8/29/2008)

8/29/2008
(p.277) Entry #22 MOTION by Charles W. Birks to Reconsider [20] Memorandum and Order entered 8/19/2008. (taq) (Entered: 8/29/2008)

9/2/2008
(p.285) Entry #23
ORDER denying plaintiff's [22] MOTION to Reconsider. Signed by Chief Judge Joseph R. Goodwin on 9/2/2008. (cc: attys; any unrepresented party) (taq) (Entered: 9/2/2008)

9/5/2008
(p.286) Entry #24
Case transferred in from West Virginia Southern. Case Number 2:07-cv-00742; documents numbered 1 - 23, certified copy of transfer order, certified docket sheet, and transfer letter received (Entered: 9/5/2008)

9/8/2008
(p.292) Entry #25
ORDER for Initial Pretrial and Scheduling Conference and Order to Disclose Interested Persons. Initial Conference set for 12/19/2008 at 01:30 PM in Courtroom 9A before Judge Vanessa D Gilmore.(Signed by Judge Vanessa D Gilmore)

(Attachments: # (1)Judge's Procedure)
Parties notified.(mmapps,) (Entered: 9/8/2008)

9/10/2008
(p.321) Entry #26 ORDER CONCERNING REMOVAL.(Signed by Judge Vanessa D Gilmore)
Parties notified.(ypippin,) (Entered: 9/10/2008)

9/24/2008
(p.323) Entry #27
MOTION to Transfer Case to Judge Sim Lake by Coughlin Stoia Geller Rudman & Robbins LLP, filed. Motion Docket Date 10/14/2008. (Patrick, Kathy) (Entered: 9/24/2008)

9/24/2008
(p.331) Entry #28 NOTICE *Designation of Lead Attorney* by Coughlin Stoia Geller Rudman & Robbins LLP, filed. (Patrick, Kathy) (Entered: 9/24/2008)

9/25/2008
(p.333) Entry #29
MEMORANDUM AND ORDER Regarding Discovery Motions, Motions for Summary Judgment and Analogous Motions to Dismiss. (Signed by Judge Vanessa D Gilmore) Parties notified.(emares,) (Entered: 9/25/2008)

9/29/2008
(p.339) Entry #30
CERTIFICATE OF INTERESTED PARTIES by Keith F. Park, Coughlin Stoia Geller Rudman & Robbins LLP, Regents of the University of California, filed.(Patrick, Kathy) (Entered: 9/29/2008)

10/14/2008
(p.341) Entry #31
Certificate of Conference by Coughlin Stoia Geller Rudman & Robbins LLP, filed. (Larson, Tracy) Modified on 12/3/2008 (ypippin,). (Entered: 10/14/2008)

10/15/2008
(p.343) Entry #32
ORDER granting [27] Motion to Transfer Case to Judge Sim Lake. (Signed by Judge Vanessa D Gilmore) Parties notified.(sbyrum,) (Entered: 10/17/2008)

10/20/2008
(p.344) Entry #33
ORDER for Initial Pretrial and Scheduling Conference and Order to Disclose Interested Persons. Initial Conference set for 12/5/2008 at 02:00 PM in Courtroom 9B before Judge Sim Lake.(Signed by Judge Sim Lake) Parties notified.(hcarr,) (Entered: 10/20/2008)

10/29/2008
(p.349) Entry #34 CERTIFICATE OF INTERESTED PARTIES by Keith F. Park, Coughlin Stoia Geller Rudman & Robbins LLP, Regents of the University of California, filed. (Larson, Tracy) (Entered: 10/29/2008)

11/5/2008
(p.351) Entry #35 MOTION to Suspend The Action by Charles W Birks, filed. Motion Docket Date 11/25/2008. (aalonzo,) (Entered: 11/6/2008)

11/5/2008
(p.358) Entry #36 CERTIFICATE OF KNOWN INTERESTED PARTIES by Charles W. Birks, filed.(aalonzo,) (Entered: 11/6/2008)

11/5/2008
(p.359) Entry #37
CORPORATE DISCLOSURE STATEMENT AND OTHER INTERESTS by Charles W. Birks, filed.(aalonzo,) (Entered: 11/6/2008)

11/6/2008
(p.360) Entry #38
RESPONSE to [35] MOTION to Stay, filed by Keith F. Park, Coughlin Stoia Geller Rudman & Robbins LLP, Regents of the University of California. (Attachments: # (1) Exhibit A, # (2) Exhibit B, #(3) Proposed Order)(Larson, Tracy) (Entered: 11/6/2008)

11/13/2008
(p.374) Entry #39
Opposed MOTION for Judgment by Keith F. Park, Coughlin Stoia Geller Rudman & Robbins LLP, Regents of the University of California, filed. Motion Docket Date 12/3/2008. (Attachments: # (1) Proposed Order, # (2) Exhibit A, # (3) Exhibit B, # (4) Exhibit C, # (5) Exhibit D, # (6) Exhibit E, # (7) Exhibit F, # (8) Exhibit G, # (9) Exhibit H, # (10) Exhibit I, # (11) Exhibit J, # (12) Exhibit K) (Larson, Tracy) (Entered: 11/13/2008)

11/17/2008
(p.558) Entry #40
ORDER denying [35] MOTION to Stay. 12/5/2008 initial pretrial and scheduling conference is canceled. (Signed by Judge Sim Lake) Parties notified.(hcarr,) (Entered: 11/17/2008)

11/28/2008
(p.559) Entry #41
RESPONSE to [39] Opposed MOTION for Judgment, filed by Charles W Birks. (jewilliams,) (Entered: 12/1/2008)

11/28/2008
(p.572) Entry #42 JOINT DISCOVERY/CASE MANAGEMENT PLAN by Charles W Birks, filed. (jewilliams,) (Entered: 12/1/2008)

11/28/2008
(p.577) Entry #43
CERTIFICATE OF SERVICE of [42] JointDiscovery/Case Management Plan, [41] Response to Motion by Charles W Birks, filed. (jewilliams,) (Entered: 12/1/2008)

2/4/2009
(p.578) Entry #44
Letter from Charles W Birks re: 4th Circuit Court of Appeals Update, filed. (Attachments: # (1) Petition for Rehearing en Banc Letter) (jewilliams,) (Entered: 2/4/2009)

2/12/2009
(p.589) Entry #45
MEMORANDUM OPINION AND ORDER granting [39] Opposed MOTION for Judgment.(Signed by Judge Sim Lake) Parties notified. (sjones,) (Entered: 2/12/2009)

2/12/2009
(p.612) Entry #46
FINAL JUDGMENT. This action is DISMISSED with prejudice. Case terminated on February 12, 2009. (Signed by Judge Sim Lake) Parties notified.(sjones,) (Entered: 2/12/2009)

2/25/2009
(p.613) Entry #47
NOTICE OF APPEAL to US Court of Appeals for the Fifth Circuit re: [46] Final Judgment by

Charles W Birks (Filing fee $ 455), filed. (jewilliams,) (Entered: 2/26/2009) 2/26/2009 APPEAL Filing fee re: [47] Notice of Appeal : $455.00, receipt number 4-599342, filed. (ejones,) Paid by Charles W. Birks. (Entered: 2/26/2009)

2/27/2009
(p.614) Entry #48
Notice of the Filing of an Appeal. DKT13 transcript order form was not mailed to appellant. Fee status: Paid. The following Notice of Appeal and related motions are pending in the District Court: [47] Notice of Appeal, filed.(ypippin,) (Entered: 2/27/2009)